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In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

In Re MICHAEL A. MENDOZA,
HOSPITAL CORPSMAN SECOND CLASS, U.S. NAVY, *Petitioner*

PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION TO THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS OR, IN THE ALTERNATIVE, A WRIT OF MANDAMUS AND PROHIBITION TO REAR ADMIRAL J.E. BOYINGTON, JR., U.S. NAVY, CHIEF OF NAVAL AIR TRAINING, CONVENING AUTHORITY AND COMMANDER P.J. STRAUB, U.S. NAVY, MILITARY JUDGE.

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QUESTION PRESENTED

Whether the Navy-Marine Corps Court of Criminal Appeals erred by authorizing a rehearing for trial error without reviewing the *factual* sufficiency of evidence in the record of trial under Article 66(c) of the Uniform Code of Military Justice, thereby prejudicing Petitioner's rights under Article 66(d) of the Code, and the Due Process and Double Jeopardy Clauses of the Fifth Amendment, at the rehearing?

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In The
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In Re MICHAEL A. MENDOZA
HOSPITAL CORPSMAN SECOND CLASS, U.S. NAVY, *Petitioner*

PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION

Hospitalman Corpsman Second Class Michael A. Mendoza, U.S. Navy, prays this Court issue a writ of mandamus and prohibition, ordering the United States Navy-Marine Corps Court of Criminal Appeals to withdraw that part of its decision of May 8, 2000 authorizing a rehearing and, further, directing the Court of Criminal Appeals to first make explicit findings resolving Petitioner's claim that the evidence was *factually* insufficient under Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c).

In the alternative, Petty Officer Mendoza prays this Court issue a writ of mandamus and prohibition to Rear Admiral Boyington, the convening authority, and Commander Straub, the military judge, directing dismissal, with prejudice, of the charge and specification of rape referred for rehearing by a general court-martial convened by Rear Admiral Boyington and currently being tried before Commander Straub, on the grounds that the rehearing violates the Double Jeopardy Clause of the Fifth Amendment and Article 66(d), UCMJ, 10 U.S.C. § 866(d).

OPINIONS BELOW

The unpublished decision of the Navy-Marine Corps Court of Criminal Appeals, setting aside the findings and sentence in Petitioner's first trial, is found in the Appendix, *infra* at 5*a*.

The as yet unpublished order of the Court of Appeals, dismissing Petitioner's petition for grant of review pursuant to Art. 67, UCMJ, is found in the Appendix, *infra* at 19*a*.

The unauthenticated transcript of the military judge's findings and conclusions of law relating to Petitioner's motion to dismiss for double jeopardy is found in the Appendix, *infra* at 20*a et seq*.

The unpublished order of the Navy-Marine Corps Court of Criminal Appeals dismissing Petty Officer Mendoza's petition for extraordinary relief is found in the Appendix, *infra* at 30*a*.

The as yet unpublished decision of the Court of Appeals denying Petitioner's writ-appeal for extraordinary relief is found in the Appendix, *infra*, at 32*a*.

JURISDICTION

On August 21, 2000, the Court of Appeals for the Armed Forces dismissed, for lack of "standing," a petition for direct review of the Navy-Marine Corps Court of Criminal Appeals' decision to authorize a rehearing in this case. On December 15, 2000, the Court of Appeals for the Armed Forces denied, without opinion, Petitioner's writ-appeal from the military judge's denial of Petitioner's motion to dismiss the charges at the rehearing on double jeopardy grounds. Petitioner has exhausted both direct and extraordinary avenues for review by the military courts. Accordingly, this Court's jurisdiction is invoked under the All Writs Act, 28 U.S.C. § 1651(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution reads, in relevant part:

> [N]or shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb...nor be deprived of life, liberty, or property, without due process of law....

STATUTORY PROVISIONS

Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 reads, in relevant part:

> (c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such parts or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.
>
> (d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, *except where the setting aside is based on lack of sufficient evidence in the record to support the findings*, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(emphasis added).

STATEMENT OF THE CASE

On April 15, 1998, a general court-martial composed of officer and enlisted members convicted the Petitioner, contrary to his pleas, of raping his stepdaughter on divers occasions between 1993 and 1996 in violation of Article 120, UCMJ, 10 U.S.C. § 920. The court-martial acquitted the Petitioner of forcible sodomy. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to pay grade E-1.

On mandatory appeal to the Navy-Marine Corps Court of Criminal Appeals pursuant to Art. 66, UCMJ, Petitioner assigned and fully briefed eleven errors. The first assignment of error was that there was a lack of sufficient evidence in the record to prove Petitioner's guilt beyond a reasonable doubt.

On May 8, 2000, a three-judge panel of the Navy-Marine Corps Court of Criminal Appeals set aside the findings of guilt and sentence because of the erroneous admission of expert testimony and evidence as to the stepdaughter's credibility. *United States v. Mendoza*, 2000 CCA LEXIS 133, No. 98-01627 (N.M.Ct.Crim.App. May 8, 2000) (unpublished). In its opinion, the Court stated:

> [T]his was a hotly contested trial. The credibility of [B] was crucial. There were neither witnesses nor physical evidence to corroborate her story. The appellant, who presented testimony from four witnesses as to his good military character, denied the allegations. As a result, we find prejudicial plain error in this close case.

United States v. Mendoza, 2000 CCA LEXIS 133 at *10-11, No. 9801627 at 6 (internal citations omitted).

The Navy-Marine Corps Court of Criminal Appeals refused to consider any of the remaining assignments of error, including the sufficiency of the evidence, stating "[o]ur decision on these issues renders discussion of the remaining issues unnecessary." *Id.* at *2, No. 9801627 at 1. The Court of Criminal Appeals then authorized a rehearing as to the charge of rape and its specification. *Id.* at *10-11, No. 9801627 at 6.

On June 16, 2000, the Chief of Naval Air Training, the convening authority in this case ordered a rehearing of the charges of rape and forcible sodomy, Art. 120 and 125, UCMJ, 10 U.S.C. §§ 920 and 925, to a general court-martial. The convening authority subsequently withdrew the charge and specification of forcible sodomy and dismissed it with prejudice.

On July 5, 2000, Petty Officer Mendoza filed a petition for grant of review by the U.S. Court of Appeals for the Armed Forces pursuant to Article 67, UCMJ, 10 U.S.C. § 867. In Petty Officer Mendoza's Supplement to Petition for Grant of Review, filed on July 7, 2000, Petty Officer Mendoza argued that the Navy-Marine Corps Court of Criminal Appeals erred by ordering a rehearing without reviewing his conviction for factual sufficiency and that the lower court's finding of material prejudice was tantamount to a finding that the evidence was factually insufficient to prove Petitioner guilty beyond a reasonable doubt, barring a rehearing under Art. 66(d), UCMJ, and the Double Jeopardy Clause.

On July 6, 2000, the Government moved to dismiss Petty Officer Mendoza's petition on the grounds that the lower court's decision, setting aside the findings and sentence, left Petitioner without "standing" to challenge the Navy-Marine Corps Court of Criminal Appeals decision. Appendix, *infra* at 14*a*. On July 7, 2000, Petty Officer Mendoza filed his response observing that Art. 67, UCMJ, contained no such limitations on the Court of Appeal's

authority to grant a petition for review. Appendix, *infra* at 16*a*. On July 18, 2000, the Government filed a motion to make additional argument in support of its motion to dismiss, arguing that Rule for Courts-Martial 1203(c)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) and the discussion to R.C.M. 1203(d), MCM (1998 ed.) preclude the Court of Appeals from reviewing a decision of the Court of Criminal Appeals setting aside the findings and sentence unless referred to the Court of Appeals by the Judge Advocate General or the Judge Advocate General notifies an appellant that he may appeal. On July 19, 2000, Petty Officer Mendoza filed an answer to the Government's motion and a motion for a stay of the rehearing.

On August 21, 2000, the Court of Appeals granted the Government's motion to dismiss the petition for grant of review without prejudice to Petty Officer Mendoza's right to file a petition for grant of review on a subsequent date. *United States v. Mendoza*, __ M.J.__, No. 00-0565 (C.A.A.F. Aug. 21, 2000) (order dismissing petition for review). Appendix, *infra* at 19*a*. The Court of Appeals further denied the Government's motion to make additional argument in support thereof and appellant's motion for stay of proceedings as moot.

On October 11, 2000, Petty Officer Mendoza filed motions before the general court-martial (Straub, J.) to dismiss the charge and specification at the rehearing for double jeopardy and for an entry of a finding of not guilty based upon the lower court's opinion in the first trial. The trial counsel filed his answer on October 13, 2000. On October 19, 2000, the military judge ruled that he did not have the authority to review a decision of the Navy-Marine Corps Court of Criminal Appeals and denied both of Petty Officer Mendoza's motions. Appendix, *infra* at 28-29*a*.

On November 2, 2000, Petitioner filed a petition for extraordinary relief in the form of a writ of mandamus with the Navy-Marine Corps Court of Criminal Appeals asserting that the

Court of Criminal Appeals erred by ordering a rehearing without reviewing the factual sufficiency of the evidence and that the rehearing violated his rights under Article 66(d), UCMJ, and the Double Jeopardy Clause of the Fifth Amendment. On November 6, 2000, the Court of Criminal Appeals issued a decision, without opinion, denying the petition "without prejudice to the petitioner's right to raise the arguments contained in the petition for extraordinary relief during the normal course of appellate review, if the petitioner is convicted." *Mendoza v. Boyington et al.*, No. 2000001767 (N.M.Ct.Crim.App. Nov. 6, 2000) (order denying petition for extraordinary relief). Appendix, *infra* at 30*a*.

On November 17, 2000, Petitioner filed a writ-appeal of the Navy-Marine Corps Court of Criminal Appeals' decision with the U.S. Court of Appeals for the Armed Forces. On December 15, 2000, the Court of Appeals issued a decision, without opinion, denying Petitioner's writ-appeal. *Mendoza v. Boyington et al.*, No. 01-8006/NA (C.A.A.F. Dec. 15, 2000) (order denying writ-appeal). Appendix, *infra* at 32*a*.

PARTIES AGAINST WHOM RELIEF IS SOUGHT

The United States Navy-Marine Corps Court of Criminal Appeals, 716 Sicard Street S.E., Suite 1000, Washington Navy Yard, DC 20374, Tel. (202) 433-2272/4158, Fax (202) 433-0090.

Rear Admiral J. E. Boyington, Jr., U.S. Navy, Chief of Naval Air Training, Convening Authority, Naval Air Station, 250 Lexington Boulevard, Corpus Christi, TX 78419-5100, Tel. (361) 961-3510, Fax (361) 961-4450.

Commander P. J. Straub, Judge Advocate General's Corps, U.S. Navy, Military Judge, Navy-Marine Corps Trial Judiciary, Atlantic Judicial Circuit Branch Office, Building 1, Room 230, Great Lakes, IL 60088-5029, Tel. (847) 688-2332, Fax (847) 688-4754.

REASONS FOR GRANTING THE PETITION

Unless this Court intervenes, on January 8th, 2001, a rehearing of a general court-martial will begin at Naval Air Station, Corpus Christi, Texas, at which the Petitioner will stand trial a second time for the same offense. This rehearing was ordered in violation of Petitioner's rights to have the sufficiency of the evidence at his first trial reviewed under Art. 66(c), UCMJ.

The Navy-Marine Corps Court of Criminal Appeals erred by ordering the rehearing without first deciding whether the record of the first trial contained sufficient evidence to support the findings of guilty as required by Art. 66(c), UCMJ. It further erred by ordering a rehearing where its finding that legal error at trial was not harmless was tantamount to a finding that the evidence was *factually* insufficient to sustain the findings of guilt. As a result, the rehearing violates, or at least implicates, Petitioner's rights under Art. 66(d), UCMJ, and the Due Process and Double and Jeopardy Clauses to not be tried again where the evidence at the first trial was insufficient to sustain the findings of guilty.

Petitioner requires a writ from this Court to compel the Navy-Marine Corps Court of Criminal Appeals to obey its mandate to review the sufficiency of the evidence before ordering a rehearing or, in the alternative, prohibit the convening authority and military judge from trying Petitioner a second time after failing to muster sufficient evidence to prove his guilt beyond a reasonable doubt at the first trial.[1]

To Petitioner's knowledge, this Court has never exercised its extraordinary writ jurisdiction to review an interlocutory decision of an ongoing court-martial since the inception of the Uniform

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[1] Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, SUPREME COURT PRACTICE § 11.2, at 500 (6th ed. 1986) ("In general, the writ of mandamus is sought to compel a lower court to do something it has refused to do, and the writ of prohibition to prohibit it from doing something it otherwise will do.").

Code of Military Justice. This is an appropriate case for this Court to exercise its writ jurisdiction for the following reasons:

A. The writ will be in aid of this Court's jurisdiction.

This Court has jurisdiction to review the decisions of the U.S. Court of Appeals for the Armed Forces by writ of certiorari, except for those actions refusing to grant a petition for review. Article 67a, UCMJ, 10 U.S.C. § 867a. In this case, however, the Court of Appeals neither granted nor denied review of Petitioner's challenge to the Navy-Marine Corps Court of Criminal Appeals decision authorizing a rehearing. Instead, the Court of Appeals granted the Government's motion to dismiss his petition for review for lack of "standing." The Court of Appeals' decision that Petitioner has no right to challenge the correctness of a lower court's order for a rehearing is unprecedented. Neither the Government in its motion to dismiss, nor the Court in its order, cited any statute or case in support of its decision. Appendix, *infra* at 5-9a.[2] Because Petitioner apparently has no "standing" to petition the Court of Appeals, he necessarily has no "standing" to petition this Court for a writ of certiorari. Consequently, a petition for extraordinary relief to this Court is the only avenue by which Petitioner may challenge the Court of Criminal Appeals decision to order a rehearing without reviewing the factual sufficiency of the record.

B. There are exceptional circumstances warranting the exercise of this Court's discretionary power.

A colorable claim of double jeopardy is a particularly appropriate case for extraordinary relief. *Cf. United States v. McDonald*, 435 U.S. 850, 862 (1978). This Court has said the "the rights conferred on a criminal accused by the Double Jeopardy

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[2] The Court of Appeals could have considered the petition, on its merits, and either granted or denied it based upon the "good cause" shown. But it had no authority to dismiss the petition for lack of "standing."

Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Abney v. United States*, 431 U.S. 651, 660 (1977); *see also Richardson v. United States,* 468 U.S. 317, 320-322 (1984). Petitioner presents two colorable claims implicating both his statutory rights under Art. 66, UCMJ, and his constitutional rights under the Due Process and Double Jeopardy Clauses.

First, Petitioner seeks review of whether the Navy-Marine Corps Court of Criminal Appeals erred by failing to review the *factual* sufficiency of the evidence at his first trial as a necessary component of challenging his rehearing under Art. 66(d), UCMJ, and the Double Jeopardy Clause. *Cf. Richardson v. United States*, 468 U.S. at 322. The Courts of Criminal Appeals have a unique statutory duty to review the *factual* sufficiency of the evidence before authorizing a rehearing. Art. 66(c), UCMJ. Moreover, sufficiency of evidence to convict is a fundamental concern of the Due Process Clause. *See Jackson v.* Virginia, 443 U.S. 307 (1979); In *re Winship*, 397 U.S. 358 (1970). Consequently, Petitioner's *factual* sufficiency claim should have been reviewed by the Court of Criminal Appeals on direct review, before ordering a rehearing.

Second, Petitioner seeks review of whether the Navy-Marine Corps Court of Criminal Appeals' conclusion that the legal error at trial was not harmless was tantamount to a finding that the evidence was not factually sufficient. Such a conclusion would bar the rehearing under both the Double Jeopardy Clause and Art. 66(d), UCMJ. *Burks v. United States*, 437 U.S. 1 (1978) .

C. Adequate relief cannot be had in any other form or from any other court.

Petitioner has exhausted both direct and extraordinary review within the military justice system. The Court of Appeals for the Armed Forces erroneously dismissed Petty Officer Mendoza's petition for direct review for lack of "standing". The military

judge conducting the rehearing has held that he lacks authority to review the sufficiency of the evidence at the first trial or dismiss the charges on the grounds of double jeopardy. Even the trial counsel (prosecutor) conceded that "the appropriate remedy, should defense seek it, would appropriately be to seek a writ with the Navy-Marine Corps Court...." Appendix, *infra* at 28*a*. The Navy-Marine Corps Court of Criminal Appeals, however, denied Petitioner extraordinary relief; declaring that Petitioner may only raise his claim of double jeopardy "during the normal course of appellate review, if the petitioner is convicted." The Court of Appeals for the Armed Forces subsequently denied Petitioner's writ-appeal of the Court of Criminal Appeals' decision.

D. The decisions of the military appellate courts delaying consideration of Petitioner's double jeopardy claims until after the conclusion of the rehearing conflict with decisions of this Court.

Both the Court of Appeals and the Navy-Marine Corps Court of Criminal Appeals, have held that Petitioner must wait until the conclusion of his rehearing and only then, *if* re-convicted, will they consider his double jeopardy claim.[3] These holdings squarely conflict with the decisions of this Court that colorable claims of double jeopardy must be addressed before the rehearing. *Richardson v. United States*, 468 U.S. at 317; *Abney v. United States*, 431 U.S. at 662.

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[3] *United States v. Mendoza*, No. 00-214/NA (C.A.A.F. Aug. 21, 2000) ("[A]ppellee's motion to dismiss is granted without prejudice to appellant's right to file a petition for grant of review on a subsequent date...."); *Mendoza v. Boyington et al.*, No. 200001767 (N.M.Ct.Crim.App. Nov. 6, 2000) ("[T]he petition [for extraordinary relief] is denied without prejudice to the petitioner's right to raise the arguments contained in the petition for extraordinary relief during the normal course of appellate review, if the petitioner is convicted.").

E. The question of whether the Double Jeopardy Clause compels an appellate court to review the sufficiency of the evidence before reversing for trial error has resulted in a split among the circuit courts of appeals and is a question which has not been, but should be, decided by this Court.

The federal appellate courts are divided over whether the Constitution requires an appellate court to consider a convicted defendant's insufficient evidence claim where there has already been a finding of reversible trial error. *See* n. 10-22, *infra*; *see generally* Sarah O. Wang, *Insufficient Attention to Insufficient Evidence: Some Double Jeopardy Implications* 79 VA. L. R. 1381 (1993). The inconsistent approaches taken by the federal circuits has increased uncertainty in the law and resulted in different treatment for similarly situated defendants - a situation that is particularly problematic because of the significant constitutional right at stake. Given the importance of the question and the frequency with which it has arisen, this case presents an opportunity for this Court to resolve this issue.

ARGUMENT

PETITIONER'S REHEARING PREJUDICES HIS RIGHTS UNDER ARTICLE 66(d), UCMJ, 10 U.S.C. § 866(d) AND THE DUE PROCESS AND DOUBLE JEOPARDY CLAUSES OF THE FIFTH AMENDMENT.

The Navy-Marine Corps Court of Criminal Appeals erred twice in this case. First, it erred by expressly refusing to review the *factual* sufficiency of the evidence before authorizing a rehearing. If this Court agrees, then the appropriate remedy is a to issue a writ of mandamus and prohibition to the Navy-Marine Corps Court of Criminal Appeals directing that Court to withdraw that part of its decision of May 8, 2000 authorizing a rehearing and direct the Court of Criminal Appeals to make explicit findings,

pursuant to Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c), whether there was sufficient evidence in the record of Petitioner's first trial to prove his guilt beyond a reasonable doubt.

Second, the Navy-Marine Corps Court of Criminal Appeals erred by authorizing a rehearing where its finding of prejudicial legal error was tantamount to a finding that the evidence in the record was *factually* insufficient to sustain the findings of guilt. As a consequence, Petitioner is being retried for an offense for which the evidence at the first trial was insufficient, in violation of the Double Jeopardy Clause of the Fifth Amendment and Art. 66(d), UCMJ. If this Court agrees, then the appropriate remedy is to issue a writ of mandamus and prohibition to the convening authority and military judge directing they dismiss the charge and specification with prejudice.

A. The Navy-Marine Corps Court of Criminal Appeals erred by ordering a rehearing without reviewing the factual sufficiency of the evidence in the first record of trial.

Petty Officer Mendoza raised the *factual* sufficiency of the evidence as his first assignment of error before Panel 1 of the Navy-Marine Corps Court of Criminal Appeals.[4] The Navy Marine Corps Court expressly refused to address Petty Officer Mendoza's claim that the evidence was factually insufficient, instead reversing for prejudicial trial error. *United States v. Mendoza*, 2000 CCA LEXIS 133 at *2, No. 9801627 at 1. ("Our decision on these issues renders discussion of the remaining issues unnecessary.").[5]

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[4] Appellant's Brief and Assignment of Errors at 3-11 (Jul. 26, 1999) A statement of all the errors alleged and briefed may be found in the Appendix, *infra* at 1*a*-4*a*.

[5] The dichotomy in the language regularly used by Panel 1 of the Navy-Marine

In doing so, the Navy-Marine Corps Court of Criminal Appeals ignored its clear duty to review both the legal and *factual*[6] sufficiency of the evidence as required by Art. 66(c), UCMJ, and the Double Jeopardy Clause.

1. Article 66(c), UCMJ, compels a Court of Criminal Appeals to review the legal and factual sufficiency of a record before it may authorize a rehearing because of prejudicial trial error.

Unlike the Circuit Courts of Appeal, the service Courts of Criminal Appeal are required to review the *entire* record of every

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Corps Court of Criminal Appeals indicates that it *routinely* does not consider the merits of factual sufficiency arguments when it decides to reverse on legal grounds. *Compare United States v. Barnes*, 53 M.J. 624, 626 (N.M.Ct.Crim.App. 2000) (DeCicco, C.J.) ("Our resolution of the first issue renders it unnecessary to discuss the other three.") (Note: The second issue in *Barnes* was factual sufficiency.) *with United States v. McAllister*, 2000 CCA LEXIS 214, No. 9901173 (N.M.Ct.Crim.App. September 29, 2000) (DeCicco, C.J.) ("The appellant raises five assignments of error for our consideration. After careful examination of these issues, we conclude that they lack merit, that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. We therefore affirm. We will discuss each issue "). Any ambiguity as to whether the Navy-Marine Corps Court of Criminal Appeals did, or did not, "consider" the factual sufficiency of the record should be resolved in Petitioner's favor. *See e.g. United States v. Wallach*, 979F.2d 912, 918 n.1 (2d Cir. 1992) *cert. denied* 508 U.S. 939 (1993).

6 Petitioner does not contest the *legal* sufficiency of the evidence. At issue is whether the evidence was *factually* sufficient, i.e. sufficient to personally convince the Navy-Marine Corps Court of Criminal Appeals of Petitioner's guilt beyond a reasonable doubt. A determination of *factual* sufficiency review, however, has the same due process and double jeopardy implications as a determination of *legal* in sufficiency. *United States v. Turner*, 25 M.J. 324, 325325 (C.M.A. 1987). It is not a reversal "in the interests" of justice. *See Tibbs. v. Florida*, 457 U.S. 31 (1982)

case "in which the sentence, as approved, extends to death, dismissal..., dishonorable or bad-conduct discharge, or confinement for one year or more." Art. 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1).[7]

In reviewing these records, Congress had given to the Courts of Criminal Appeals fact-finding powers which are not possessed by any other federal appellate court. *Taylor v. Jackson*, 353 U.S. 569, 575-577 (1957); *see also United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990) ("This awesome, plenary, *de novo* power of review grants unto the Court of Military Review authority to, indeed, 'substitute its judgment' for that of the military judge...[or] court members."); *United States v. McCrary*, 1 C.M.R. 1, 3 (C.M.A. 1951) (Boards of Review may substitute their judgment for that of the triers of fact.).[8]

Consequently, the Courts of Criminal Appeals have the duty to determine not only the *legal* sufficiency of the evidence but also its *factual* sufficiency:

> [U]nder Article 66(c) of the Uniform Code...the Court of Military Review has a duty of determining not only the legal sufficiency of the evidence but also its factual sufficiency. The test for the former is whether, considering the evidence in the light most favorable to the

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[7] The Judge Advocate General may also refer other cases which do not meet the statutory requirements for review. *See* Art. 69(d), UCMJ, 10 U.S.C. § 869(d). In those cases, the Courts of Criminal Appeals are statutorily prohibited from reviewing the *factual* sufficiency of the evidence. Art. 69(e), UCMJ, 10 U.S.C. § 869(e).

[8] As part of the Military Justice Act of 1968, Congress renamed the Air Force, Army, Coast Guard, and Navy-Marine Corps Boards of Review as Courts of Military Review. Act of Oct. 24, 1968, P.L. 90-632, § 2(27), 82 Stat. 1341. In 1994 Congress renamed the Courts of Military Review as Courts of Criminal Appeals. Act of Oct. 5, 1994, P.L. 103-337, Div A, Title IX, Subtitle C, § 924(b)(2), (c)(1), (4)(A), 108 Stat. 2831, 2832.

> prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979). ***For factual sufficiency, the test is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the Court of Military Review are themselves convinced of the accused's guilt beyond a reasonable doubt.***

United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987) (emphasis added). When a Court of Criminal Appeals sets aside a finding of guilty based on lack of sufficient evidence in the record, it may not order a rehearing. Art. 66(d), UCMJ.

By declining to review the *factual* sufficiency of the evidence, the Navy-Marine Corps Court of Criminal Appeals denied Petitioner's statutory right to appellate review under Art. 66(c), UCMJ, and implicated Petitioner's rights under Art. 66(d), UCMJ, and the Due Process and Double Jeopardy clauses. *See United States v. Turner*, 25 M.J. at 325 ("Consistent with the factfinding power that it confers on the Court of Military Review, Article 66 of the Code requires that court to evaluate not only the sufficiency of the evidence but also its weight. Government counsel concede that, if the court below failed to perform this factual sufficiency review, then appellant was deprived of an important safeguard; and in that event the case should be remanded to the Court of Military Review for completion of a factual review of the finding of guilty.").

The Navy-Marine Corps Court of Criminal Appeals has, in the past, demonstrated a similar reluctance to review the factual sufficiency of records before it, despite Congress' plain mandate to do so. As a result, the Court of Appeals for the Armed Forces has intervened to ensure that the lower court carries out its duties under Art. 66(c), UCMJ. *See e.g. United States v. Turner*, 25 M.J.

at 325 (Remanding the case to the Court of Military Review to make an "explicit finding as to whether from their review of the record they are convinced beyond a reasonable doubt of the appellant's guilt."); *see also United States v. Martinez*, 50 M.J. 344 (C.A.A.F. 1998) (summary disposition) (Directing the lower court to conduct a full and proper factual sufficiency review pursuant to Art 66(c), UCMJ.);

Inexplicably, the Court of Appeals for the Armed Forces has declined to intervene in this case. It has refused "standing" for Petitioner to raise the issue on direct appeal and it has refused to order extraordinary relief. The Court of Appeals for the Armed Forces has twice thwarted Petitioner's efforts to compel the Navy-Marine Corps Court of Criminal Appeals to review the factual sufficiency of the evidence at his first trial, in each instance without explanation or citation to any controlling legal authority.

Now this Court must intervene to ensure that the factual sufficiency of the evidence at the first trial has been reviewed by the Navy-Marine Corps Court of Criminal Appeals as Congress intended. Otherwise, Petitioner's will be denied the statutory protection of Art. 66(d), which was enacted to protect him from being tried twice where the evidence at the first trial was insufficient.

2. The Due Process and Double Jeopardy Clauses compel a Court of Criminal Appeals to review the legal and factual sufficiency of a record before it may authorize a rehearing because of prejudicial trial error.

The Navy-Marine Corps Court's authorization for a rehearing, without reviewing the factual sufficiency of the evidence, also implicates Petitioner's rights under the Due Process and Double Jeopardy Clauses of the Fifth Amendment.

There is no question that a reviewing court's determination of evidentiary insufficiency bars retrial. *Burks v. United States,* 437 U.S. at 18. (Holding that an appellate court's finding of [legally] insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal.). The constitutional issues to be decided are: (a) whether the Due Process and Double Jeopardy Clauses of the Constitution compel an appellate court to review the sufficiency of the evidence where there is reversible trial error; and if so (b) whether the protection afforded by the Due Process and Double Jeopardy Clauses extends to the *factual* sufficiency review contemplated by Congress under Art. 66(c), UCMJ.

(a) The Due Process and Double Jeopardy Clauses require an appellate court to review a claim of insufficient evidence.

In Burks v. United States, this Court overruled an earlier line of cases and held that an appellate determination of evidentiary insufficiency is an absolute bar to a rehearing, even where "a defendant has sought a new trial as one of his remedies, or even as the sole remedy." 437 U.S. at 17-18. The logical implication of *Burks* is that, where an appellate court finds both evidentiary insufficiency *and* trial error, it may not ignore the evidentiary insufficiency, and the resulting bar to retrial, and order a rehearing based upon trial error.

Following the *Burks* decision, the Circuit Courts of Appeal uniformly found that effectuation of the double jeopardy protection prescribed by *Burks* required appellate courts to review a defendant's insufficient evidence claim. *See, e.g., United States v. Perez-Reveles*, 715 F.2d 1348, 1355 (9th Cir. 1983); *United States v. Sneed*, 705 F.2d 745 (5th Cir. 1983), *overruled* by *United States v. Miller*, 952 F.2d 866, 871 (5th Cir.); *Delk v. Atkinson*, 665 F.2d 90, 93 n.1 (6th Cir. 1981); *United States v. McManaman*, 606 F.2d 919, 927 (10th Cir. 1979); *United States v. United States*

Gypsum Co., 600 F.2d 414, 416 (3d Cir.), *cert. denied*, 444 U.S. 884 (1979). Two subsequent decisions of this Court, however, threw a monkey wrench into this uniform approach.

In *Justices of Boston Municipal Court v. Lydon*, the defendant asserted a double jeopardy challenge to a second-tier jury trial, asserting that the evidence at the first-tier bench trial was insufficient and that *Burks*, therefore, barred the second-tier trial. 466 U.S. 294, 302-03 (1984). This Court rejected that claim; however, the holding is limited to the unique two-tier trial procedure. *Id.* at 310; *see also United States v. Wood*, 958 F.2d 963, 968-69 (10th Cir. 1992) ("*Lydon* must be considered in the context of the two-tier system under review."). Perhaps the most significant distinction between the two-tiered system in *Lydon*, and this case is that, under the two-tiered system, there was no provision for appellate review of the first bench trial, nor any requirement that an appellant articulate legal error in order to request the *de novo* jury trial. *Lydon*, 466 U.S. at 311. In contrast, this Court noted that "[I]f the prosecution succeeds in obtaining a conviction the second time, the defendant then has the usual appellate remedies." *Id.* at 312. Those remedies, presumptively, include the right to challenge the sufficiency of the evidence.

In *Richardson v. United States*, 468 U.S. at 318, this Court rejected the defendant's double jeopardy challenge to a rehearing following a hung-jury mistrial. This Court, as in *Lydon*, predicated is decision on the concept of "continuing jeopardy"[9] and concluded that the hung-jury mistrial was not a jeopardy-terminating events. *Id.* at 326. The retrial was simply a continuation of the proceedings and the sufficiency of the evidence at the first trial could never implicate the defendant's double jeopardy rights. *Id.* Like the election of a *de novo* jury

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[9] Commentators have criticized the "continuing jeopardy" concept as difficult to apply and contrary to traditional double jeopardy policies and values and suggested this Court ought to overrule it. *See* Wang, 79 Va.L.R. at 1397-1404.

trial in *Lydon*, the declaration of a mistrial does not usually result in direct appellate review of the first proceeding.

Since this Court's 1984 decision in *Richardson*, there has been a split among the circuit courts of appeals as to whether an appellate court must review a claim of insufficient evidence where that court also has a claim of trial error upon which it may reverse the conviction and order a rehearing. The Second,[10] Third,[11] Sixth,[12] Ninth, [13] and Tenth Circuit[14] Courts of Appeals have all

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[10] In *United States v. Wallach*, 979 F.2d 912, 917 (2d Cir. 1992) *cert. denied* 508 U.S. 939 (1993) the Second Circuit, on an interlocutory appeal from a rehearing ordered because of trial error, and in reference to "double jeopardy protection," held that "a reversal of a conviction on grounds other than sufficiency does not avoid the need to determine the sufficiency of the evidence before a retrial may occur, *see United States v. Bibbero*, 749 F.2d 581, 586 (9th Cir. 1984), *cert. denied*, 471 U.S. 1103 [...] (1985)."

[11] In *Vogel v. Pennysylvania*, 790 F.2d 368, 376 (1986), the Third Circuit reaffirmed "that when a defendant raises an insufficiency of evidence contention that the trial court finds unnecessary to address, a court subsequently presented with a double jeopardy argument must address and resolve that issue. We believe *Burks* requires as much when the original proceedings were in the state courts. A defendant's double jeopardy right should not be affected by the fact that a trial judge chooses not to answer the difficult but, under *Burks*, relevant question."

[12] In *United States v. Quinn*, 901 F.2d 522, 529 n.5 (6th Cir. 1990) the Sixth Circuit reviewed the appellant's evidentiary sufficiency claim, even though it had already identified reversible trial error, noting "[t]he reversal on trial error here does not necessarily obviate the need to review the sufficiency of the evidence." (citations omitted).

[13] In *United States v. Szado*, 912 F.2d 390, 392 (9th Cir. 1990), the appellant consistently asserted a specific right to have a ruling on the sufficiency of the evidence before a second trial. Relying on this Court's decisions in *Abney* and *Richardson*, the Ninth Circuit determined it had jurisdiction to consider Szado's claim. *Id.* at 392-393. The Court of Appeals then held that "[b]ecause 'an appellate reversal of a conviction on the basis of insufficiency of the evidence has the same effect as a judgment of acquittal,' *i.e.* the double jeopardy clause precludes retrial, 'the existence of other grounds for reversal does not avoid the necessity of reviewing the sufficiency of the evidence.'" *Id.* at 393 (quoting

held that an appellant is entitled to have his evidentiary sufficiency claim reviewed, even where reversible trial error will result in a rehearing, because of double jeopardy considerations.

The Fifth[15] and the Eleventh[16] Circuit Courts of Appeal have concluded, based upon this Court's decision in *Richardson*, that appellate review of evidentiary sufficiency claims is not required

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*United States v. Bibb*ero, 749 F.2d 581, 586 (9th Cir. 1984), cert. denied, 471 U.S. 1103, [...] (1985).

[14] In *United States v. Haddock*, 961 F.2d 933 (10th Cir. 1992) (*en banc*) *cert. denied* 506 U.S. 828 (1992) the Tenth Circuit reaffirmed that, when it reverses on appeal because of a procedural error at trial and remands for a new trial, the Court of Appeals must nevertheless address the defendant's sufficiency of evidence claim, reasoning that if evidence indeed was insufficient, retrial is barred by double jeopardy principles.

[15] In *United States v. Miller*, 952 F.2d 866 (5th Cir. 1992) *cert. denied sub nom. Huls v. United States*, 505 U.S. 1220 (1992), the Fifth Circuit overruled *United States v. Sneed*, 705 F.2d 745 (5th Cir. 1983) and, on the basis of *Richardson*, held that when a conviction has been reversed for trial error there is no jeopardy terminating event. 952 F.2d. at 872. As a result, the Court of Appeals concluded that the Due Process and Double Jeopardy Clauses do not mandate the appellate court review the sufficiency of the evidence in the initial trial. *Id.* Nevertheless, according to *Miller*, when an appellate court is presented with two such challenges, it is "clearly the better practice" to dispose of a properly presented claim of insufficiency. *Id.* at 874.

[16] In *United States v. Adkinson*, 135 F.2d 1363, 1379 (11th Cir. 1998), the Eleventh Circuit reversed for trial error, holding that "if, in the trial here under review the government failed to present sufficient evidence to support a conviction of any one of the appellants, that defendant may not be placed in further jeopardy by a new trial. We must, therefore, determine whether or not there was sufficient evidence vis-a-vis each appellant." (footnotes omitted). In a footnote, the Court indicated that "[a]lthough not mandated by the double jeopardy clause, it is clearly the better practice for the appellate court on an initial appeal to dispose of any claim properly presented to it that the evidence at trial was legally insufficient to warrant the thus challenged conviction. *Miller*, 952 F.2d at 874." *Id.* at 1329, n.48.

by the Double Jeopardy Clause where a conviction is reversed for trial error and a rehearing ordered. Those circuits nevertheless favor consideration of such claims raised on direct review because it is the "better practice." This discretionary review articulated by the Fifth Circuit decision in *Miller*, *supra* at n.15, has come under criticism within the Fifth Circuit. *See Vanderbilt v. Collins*, 994 F.2d 189 (5th Cir. 1993) *cert. denied* 510 U.S. 833 (1993).[17]

The First,[18] Third,[19] Seventh,[20] Eighth,[21] and Ninth[22]

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17 "One must share the concern raised by the appellee and by Justices Brennan and Marshall dissenting in *Richardson*, that if on direct appeal, the court is presented with two valid challenges to a conviction, one based upon trial error and another based upon sufficiency, the defendant's double jeopardy rights may depend upon the whim of the appellate court in determining the ground for reversal. [...] Albeit with significant reservations, we are constrained to follow circuit precedent, absent legislation, intervening Supreme Court teachings or an *en banc* holding to the contrary." *Id.* at 195-96.

18 In *United States v. Porter*, 807 F.2d 21 (1st Cir. 1986), the First Circuit rejected the appellant's interlocutory double jeopardy challenge to his rehearing after his first conviction was reversed for trial error. Porter did not, however, challenge the sufficiency of the evidence on direct appeal, asserting only trial error for which the First Circuit reversed and ordered the rehearing. *United States v. Porter*, 764 F.2d 1, 15-16 (1st Cir. 1985) *cert. denied* 481 U.S. 1048 (1987).

19 In *Evans v. Court of Common Pleas*, 959 F.2d 1227 (3d Cir. 1992) *cert. denied* 497 U.S. 1028 (1993), the Third Circuit rejected an appeal from the district court's decision denying a petition for a writ of *habeas corpus* alleging a denial of due process. The petitioner in *Evans* claimed that her retrial, following the state court's reversal for legal error, should be barred under the Double Jeopardy Clause because the evidence at the first trial was insufficient. On direct appeal, however, the Pennsylvania Superior Court had explicitly found that the evidence *was* sufficient to support Evans's conviction, but held that trial error required reversal and a new trial. *Id.* at 1229. Nowhere in the *Evans* decision does the Third Circuit distinguish or overrule its earlier decision in *Vogel v. Pennsylvania*, *supra* at n11.

20 In *United States v. Ganos*, 961 F.2d 1284 (7th Cir. 1992) the district court denied the appellant's post-trial motion for acquittal based upon insufficient evidence but ordered a new trial based on trial error. *Id.* at 1285. Before the

Circuits, relying on *Richardson*, have all denied interlocutory claims from defendants seeking a review of the evidence at an earlier proceeding which was reversed for trial error. In each of those cases, however, the defendant either failed to raise a claim of evidentiary sufficiency on direct appeal or had that claim adjudicated adversely on one or more occasions.

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retrial could commence, Ganos filed a notice of appeal, contending that a new trial after an initial trial at which the evidence was insufficient would violate the Double Jeopardy Clause. *Id.* In a brief *per curiam* opinion the Seventh Circuit, relying on *Richardson*, dismissed Ganos' appeal as frivolous, stating "[a]n appeal in search of such a decision accordingly is not an invocation of the double jeopardy clause; it is an ordinary challenge to the sufficiency of the evidence." As the concurrence noted that the "result today does not follow inexorably from *Richardson*. *Id.* at 1286 (Ripple, J., concurring).

[21] In *Satter v. Leapley*, 977 F.2d 1259, 1263 (8th Cir. 1992), the Court of Appeals, following the reasoning in *Evans,* affirmed the district court's denial of a petition for writ of *habeas corpus* alleging due process and double jeopardy violations based upon insufficient evidence at petitioner's first trial. The petitioner's first trial had been reversed by the state's Supreme Court for trial error and a new trial ordered. *Id.* at 1261. Both the state's Supreme Court, on direct review, and the state's habeas court, considered and found the evidence at the first trial to be sufficient. *Id.* at 1260-61, n.1. The Eighth Circuit also identified petitioner's failure to raise the evidentiary sufficiency issue before the South Dakota Supreme Court in his *habeas* appeal as an independent ground for denying the petition. *Id.* at 1262-63.

[22] In *United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999) *cert. denied sub nom Mikayelyan v. United States*, __ U.S. __. 147 L. Ed. 2d 260, 120 S. Ct. 2230, 2000 U.S. LEXIS 3907, 68 U.S.L.W. 3748 (U.S. 2000), co-defendants Mikayelyan and Semenov moved for a judgment of acquittal on an extortion count based on insufficiency of the evidence. The district court denied the defendant's motions for judgment of acquittal and Mikayelyan's motion for a new trial, but granted a new trial to Semenov on an unrelated issue. On appeal, the Court of Appeals concluded that it *did not* have jurisdiction to consider Semenov's interlocutory appeal of evidentiary sufficiency because he had been granted a retrial and was under "continuing jeopardy." *Id.* at 983. Because Mikayelyan was not granted a retrial, the Court of Appeals concluded it *did have* jurisdiction to review the sufficiency of the evidence. *Id.*

This Court, however, has never extended the concept of continuing jurisdiction in *Lydon* or *Richardson*, to conclude there is no right under the Due Process and Double Jeopardy Clauses to direct appellate review of evidentiary sufficiency in trials ending in convictions which are reversible for trial error. Nor do this Court's decisions in *Richardson* and *Justices of Boston Municipal Court v. Lydon* suggest or compel such a result, the decisions of some of those Circuit Courts of Appeal which disagree notwithstanding.

When a jury arrives at a verdict, those interests which support the concept of "continuing jeopardy" dissipate. The prosecution has been given its "one complete opportunity to convict those who have violated its laws." *Richardson v. United States*, 468 U.S. at 324 (quoting *Arizona v. Washington*, 434 U.S. 497 (1978)). The trial is over, jeopardy terminates, and the process of post-trial and appellate review begins. If the conviction is affirmed, the accused may not be tried or punished again for the same offense. If the appellate court determines that the evidence was *legally* or (in the case of the Courts of Criminal Appeals) *factually* insufficient, then the conviction is reversed as though there had been an acquittal and a rehearing is barred.

A rehearing for trial error is not a continuation of the first trial, it is a second trial afforded a defendant because an appellate court has concluded that the verdict in the first trial was procured in violation of a substantial right of the appellant. *Id.* at 329. This second trial is permissible under the Double Jeopardy clause, not because it is a continuation of the first trial, but because the "manifest necessity" of granting it does not offend the principles underlying the Double Jeopardy Clause. *Cf. Arizona v. Washington*, 434 U.S. 97 (1977) ("manifest necessity" justifies retrial after mistrial); *see also Richardson v. United States*, 468 U.S. at 329 (Brennan, J., concurring in part and dissenting in part). Moreover, the remedy of a rehearing is for the appellant and not

the Government. If, for example, a defendant successfully alleged only evidentiary insufficiency on appeal, the Government could not point out legal error to the reviewing court and request it order a retrial instead of dismissing the charge. In contrast, the declaration of a hung-jury mistrial is as much a remedy for the Government as it is for the defendant. Both are entitled to a jury's verdict. *Richardson v. United States,* 468 U.S. at 326 ("The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree."). Since an appellant may waive a claim of legal error, he ought to be able to waive the remedy of retrial in favor of the greater right to not be retried at all if the evidence at the first trial is insufficient. There is no logical reason, therefore, that an appellant should be forced to elect between a legal sufficiency claim and a claim of trial error.

(b) The protections of the Due Process and Double Jeopardy Clauses apply to a Court of Criminal Appeals review of a claim of *factual* insufficiency of the evidence.

The protections of the Due Process and Double Jeopardy Clauses must extend to the review of the *factual* sufficiency of courts-martial convictions under Art.66(c), UCMJ. Because the Navy-Marine Corps Court of Criminal Appeals must weigh the evidence and be personally convinced of an appellant's guilt beyond a reasonable doubt, a finding of factually insufficiency amounts to an acquittal barring a rehearing under the Double Jeopardy Clause and the express language of Art. 66(d), UCMJ. This Art. 66(c) review, then, is readily distinguishable from *Tibbs v. Florida*, 457 U.S. 31 (1982). In *Tibbs*, this Court held that a retrial authorized by the Florida Supreme Court was not barred by the Double Jeopardy Clause where reversal of the conviction was predicated upon the appellate court's concerns about the weight of the evidence. As the Florida Supreme Court noted, however,

reversal on evidentiary weight is not the same as reversal because the evidence was insufficient beyond a reasonable doubt. *Tibbs v. State*, 297 So.2d 1120, 1224 (Fla. 1981); *see also Greene v. Massey*, 437 U.S. 19, 25 (1978) ("By using the precise terminology 'lacking in establishing beyond a reasonable doubt,' the highest court in Florida seems to have clearly said that there was insufficient evidence to permit the jury to convict petitioner at his first trial."). Moreover, the statute authorizing the appellate court to reverse in the interests of justice specifically authorized new trials as the sole remedy. *Tibbs v. Florida*, 457 U.S. at 36.

Requiring the Navy-Marine Corps Court of Criminal Appeals to review the factual sufficiency of the evidence fulfills the principles of the Double Jeopardy Clause by ensuring that the Government had proved Petitioner's guilt beyond a reasonable doubt at the first trial before requiring him to "endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Abney v. United States*, 431 U.S. at 656. It also serves the best interests of the Navy and the other witnesses to this case. A determination that the evidence was factually insufficient will avoid the necessity of diverting scarce military resources to retry this case. These logistical and other considerations are precisely why Congress gave the Courts of Criminal Appeals such extraordinary fact-finding powers. *Cf. Jackson v. Taylor*, 353 U.S. at 579-580 (1957).

B. The Navy-Marine Corps Court of Criminal Appeals erred by ordering a rehearing where its finding of prejudicial legal error was tantamount to a finding that the evidence was factually insufficient to sustain the findings of guilt.

The Navy-Marine Corps Court of Criminal Appeals' finding that the legal error in Petitioner's case was not "harmless" was tantamount to a finding that the evidence was factually insufficient to prove Petitioner guilty beyond a reasonable doubt.

Accordingly, Petitioner's rehearing is prohibited by the Double Jeopardy Clause and Art.66(d), UCMJ. The Court of Criminal Appeals, in considering whether the erroneous admission of expert testimony concerning the credibility of the 7-year-old prosecutrix prejudiced Petitioner, stated:

> [T]his was a hotly contested trial. The credibility of [B] was crucial. ***There were neither witnesses nor physical evidence to corroborate her story. The appellant, who presented testimony from four witnesses as to his good military character, denied the allegations.*** As a result, we find prejudicial plain error in ***this close case***. *Harrison*, 31 M.J. at 332-33; *cf. United States v. Marrie*, 3 M.J. 35 (1995) (affirming guilty findings where the Court was able to determine that the error in the admission of such testimony was harmless beyond a reasonable doubt.)

United States v. Mendoza, 2000 CCA LEXIS 133 at *10-11, No. 9801627 at 6 (emphasis added). The quoted language implies that the judges were not personally convinced that the evidence, absent the erroneously admitted testimony as to the prosecutrix's credibility,[23] proved Petitioner's guilt beyond a reasonable doubt.

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[23] This Court's decision in *Lockhart v. Nelson*, 488 U.S. 33 (1988) is inapplicable to the *factual* sufficiency review of a Court of Criminal Appeals. In *Lockhart*, this Court held that, in evaluating the *legal* sufficiency of the evidence, a reviewing court must consider *all* of the evidence admitted by the trial court in the light most favorable to the Government. *Id.* at 41. In contrast, a Court of Criminal Appeals must "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact...." The erroneously admitted evidence in this case involved expert opinions as to the prosecutrix's credibility which are "ordinarily neither useful to the jury nor admissible." *United States v. Mendoza*, 2000 CCA LEXIS 133 at *7. Consequently, erroneously admitted evidence like that in the case *sub judice* will have no weight in the Court of Criminal Appeals' factual sufficiency determination. In fact, the President has expressly prohibited a rehearing if the proof of guilt necessary to sustain the

This Court has distinguished harmless error analysis from *legal* sufficiency analysis. *See e.g. United States v. Lane et al.*, 474 U.S. 438, 450 n.13 (1986). Consequently, an appellate court may conclude that an appellant was prejudiced by the erroneous admission of evidence while still concluding that the remaining evidence was legally sufficient. This makes sense where the test for legal sufficiency of evidence is whether a reasonable fact finder, *considering the evidence in a light most favorable to the Government*, could find all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The unique question for the military, however, is whether the Navy-Marine Corps Court of Criminal Appeals can ever be *personally convinced of an accused's guilt beyond a reasonable doubt* but nevertheless find that an error might have contributed to the conviction or substantially influenced the outcome of the trial? Where the error involves the erroneous admission of prejudicial, but otherwise nonprobative, evidence against an accused the answer is necessarily "no." [24] Because the Navy-Marine Corps Court of Criminal Appeals found a reasonable possibility that the erroneous admission of the evidence in this case might have contributed to the conviction, it must necessarily have concluded that a rational trier of fact might have a "reasonable doubt" that the remaining evidence was sufficient to prove all the essential elements. *Cf. Neder v. United States*, 527 U.S. 1, 18 (1999) ("We

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sufficiency of the evidence consists of inadmissible evidence for which there is no admissible substitute." *See* R.C.M. 1107(e)(1)(C)(ii), MCM (1998 ed.)

[24] Where the error involves, for example, the *exclusion* of exculpatory or impeachment evidence there will be a different result. In those cases, the evidence in the record ordinarily will be sufficient to prove the offenses beyond a reasonable doubt. The question of harmlessness then becomes whether the inclusion of the excluded evidence would tip the balance in favor of the appellant.

think, therefore, that the harmless-error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?").

Since the Navy-Marine Corps Court of Criminal Appeals reasonably doubted whether a "rational jury" would necessarily have found Petty Officer Mendoza guilty on the evidence, absent error, the lower court could not, itself, have been convinced there was proof beyond a reasonable doubt. *Cf. Sullivan v. Louisiana,* 508 U.S. 275, 284 (1993) (Rehnquist, C.J. concurring) ("any time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decision making process; for in the end no judge can know for certain what factors led to the jury's verdict.").

The circumstances of this case, the Court of Criminal Appeal's characterization of the state of the evidence, and the lower court's finding of prejudice necessarily lead to the conclusion that, absent the erroneously admitted evidence, the evidence was *factually* insufficient to find Petty Officer Mendoza guilty "beyond a reasonable doubt." The appropriate remedy should have been to dismiss the findings and sentence with prejudice. By authorizing a rehearing, the Navy-Marine Corps Court of Criminal Appeals materially prejudiced the substantial rights of Petty Officer Mendoza under the Fifth Amendment and Art. 66(d), UCMJ, by giving the Government, as a result of its own error, a second chance to try and prove its case beyond a reasonable doubt. The implications of double jeopardy are not hypothetical in this case. *See Burks v. United States*, 437 U.S. at 11 ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."). The Government has given notice under Mil.R.Evid. 404(b) of its intent to offer additional evidence not presented at the first trial. Trial is set to begin on January 8, 2001.

CONCLUSION

Short of a condemned prisoner awaiting execution, it is difficult to imagine a more compelling circumstance for extraordinary relief than that of Petitioner. Unless this Court intervenes, Petty Officer Mendoza will stand trial twice for a crime for which the evidence at the first trial was insufficient to prove his guilt beyond a reasonable doubt. Regardless of whether he is acquitted, or convicted and his right against double jeopardy vindicated on appeal, the anguish, embarrassment and public vilification arising out being tried a second time for the rape of a child cannot be dissipated. If convicted again, he may be reconfined for months, or even years, before his double jeopardy claim is reviewed by the Navy-Marine Corps Court of Criminal Appeals pursuant to Art. 66, UCMJ.

WHEREFORE, Petty Officer Mendoza prays this Honorable Court grant this petition and order the relief requested and such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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APPENDIX

Errors Assigned and Briefed Before the Navy-Marine Corps Court of Criminal Appeals

I. THE GOVERNMENT FAILED TO PROVE PETTY OFFICER MENDOZA'S GUILT BEYOND A REASONABLE DOUBT.

II. THE MILITARY JUDGE ERRED IN ADMITTING GINA MENDOZA'S TESTIMONY OF STATEMENTS ALLEGEDLY MADE TO HER BY BRIANNA MEYER ON 17 MAY 1997.

III. THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE OF PETTY OFFICER MENDOZA'S PRIOR PHYSICAL ABUSE OF BRIANNA.

IV. THE MILITARY JUDGE ERRED IN PERMITTING BRIANNA MEYER TO TESTIFY BY CLOSED-CIRCUIT TELEVISION THEREBY DENYING PETTY OFFICER MENDOZA HIS 6TH AMENDMENT RIGHT TO CONFRONT A WITNESS AGAINST HIM.

V. THE MILITARY JUDGE ERRED IN ALLOWING CAPT BARBARA CRAIG TO TESTIFY BEYOND THE SCOPE OF HER EXPERTISE AND WITHOUT LAYING A FOUNDATION FOR HER NON-CLINICAL EXPERT TESTIMONY UNDER DAUBERT V. MERRELL DOW PHARMCEUTICALS.

VI. ADMISSION OF LCDR HUERTAS' TESTIMONY THAT HE DIAGNOSED BRIANNA MEYER AS SUFFERING FROM CHILD SEXUAL ABUSE, AND THAT SHE WAS INCAPABLE OF FABRICATING HER TESTIMONY, WAS PLAIN ERROR.

VII. THE ADMISSION OF PROSECUTION EXHIBIT 6, A PSYCHOLOGICAL EVALUATION OF BRIANNA MEYER, WAS PLAIN ERROR.

VIII. TRIAL COUNSEL'S CLOSING ARGUMENT WAS SO INFLAMMATORY AND CONTRARY TO THE LAW AS TO VIOLATE PETTY OFFICER MENDOZA'S RIGHT TO A FAIR TRIAL.

IX. TRIAL COUNSEL'S QUESTION TO PETTY OFFICER MENDOZA, "SO WHO'S LYING," PREJUDICED HIS SUBSTANTIAL RIGHT TO A FAIR TRIAL.

X. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

A. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL DEFENSE COUNSEL FAILED TO OBJECT TO LCDR HUERTAS' TESTIMONY THAT BRIANNA MEYER HAD, IN FACT, BEEN SEXUALLY ABUSED AND THAT SHE WAS NOT CAPABLE OF FABRICATING HER TESTIMONY.

B. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL DEFENSE COUNSEL FAILED TO ELICIT CRITICAL TESTIMONY OR OFFER EVIDENCE OF GINA MENDOZA'S AND BRIANNA MEYER'S MOTIVE TO FABRICATE.

C. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL DEFENSE COUNSEL FAILED TO RESEARCH OR OFFER EXPERT TESTIMONY CONCERNING FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE IN THE CONTEXT OF DIVORCE.

D. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE ATTORNEYS FAILED TO INTRODUCE EVIDENCE THAT PETTY OFFICER MENDOZA HAD DENIED SEXUALLY ABUSING HIS DAUGHTER.

E. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE ATTORNEYS FAILED TO OBJECT TO THE ADMISSION OF PROSECUTION EXHIBIT 6, THE PSYCHOLOGICAL EVALUATION REPORT OF BRIANNA MEYER.

F. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE FAILED TO CROSS-EXAMINE GINA MENDOZA ON, OR OTHERWISE SEEK ADMISSION OF, EVIDENCE THAT BRIANNA MEYER MAY HAVE BEEN EXPOSED TO PORNOGRAPHY.

G. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE ATTORNEYS FAILED TO OBJECT TO THE ADMISSION OF PROSECUTION EXHIBIT 4.

H. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE ATTORNEYS FAILED TO OBJECT TO THE ADMISSION OF PROSECUTION EXHIBITS 5 AND 7.

I. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE ATTORNEYS FAILED TO MAKE TIMELY OBJECTIONS TO TRIAL COUNSEL'S CLOSING ARGUMENTS.

J. PETTY OFFICER MENDOZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE ATTORNEYS FAILED TO MAKE TIMELY OBJECTIONS TO CAPT CRAIG'S TESTIMONY AS TO REHABILITATIVE POTENTIAL.

XI. PETTY OFFICER MENDOZA WAS UNLAWFULLY REDUCED TO PAYGRADE E-1 AND SUBJECTED TO FORFEITURE OF ALL PAY AND ALLOWANCES, PRIOR TO THE CONVENING AUTHORITY'S ACTION, IN VIOLATION OF ARTICLE I, SECTION 9, OF THE UNITED STATES CONSTITUTION (EX POST FACTO CLAUSE).

United States v. Mendoza, 2000 CCA LEXIS 133, No. 9801627 (N.M.Ct.Crim.App. May 8, 2000) (unpublished)

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

W.A. DeCICCO R.H. TROIDL D.A. ANDERSON

UNITED STATES

v.

Michael A. MENDOZA
Hospital Corpsman Second Class (E-5), U.S. Navy

NMCM 9801627 Decided 8 May 2000

Sentence adjudged 15 April 1998. Military Judge: J.D.Rockwell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Air Training, Naval Air Station, Corpus Christi, TX.

LCDR MICHAEL J. WENTWORTH, JAGC, USN, Appellate Defense Counsel
LT J.K. O'GRADY, JAGC, USNR, Appellate Government Counsel

[*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DeCICCO, Chief Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of raping his stepdaughter [B], a child under the age of 12, on divers occasions between 1993 and 1996 in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The court-martial acquitted the appellant of forcible sodomy. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to [*2] pay grade E-1.

The appellant has raised 11 issues for our consideration in this appeal. Because we find prejudicial plain error in the admission of certain evidence, we will discuss only the two issues relating to that evidence.[1] Our decision on these issues renders discussion of the remaining issues unnecessary. Our rationale is set forth below.

Facts

The appellant was charged with raping his stepdaughter, [B], a child under the age of 12, on divers occasions between October 1993 and Dec. 1996. [B] was born in 1990. After the prosecution presented the testimony of [B] and [B]'s mother, it called a pediatrician who examined [B] in May 1997. This doctor found no evidence of trauma or physical injury and stated that [*3] the examination was completely normal.

The prosecution then called Lieutenant Commander

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[1] VI. ADMISSION OF LCDR HUERTAS' TESTIMONY THAT HE DIAGNOSED [B] AS SUFFERING FROM CHILD SEXUAL ABUSE, AND THAT SHE WAS INCAPABLE OF FABRICATING HER TESTIMONY, WAS PLAIN ERROR.

VII. THE ADMISSION OF PROSECUTION EXHIBIT 6, A PSYCHOLOGICAL EVALUATION OF [B] WAS PLAIN ERROR.

Victor M. Huertas, Medical Service Corps, U.S. Navy, a child psychologist. He examined [B] in February 1998, about two months before the court-martial, at the request of the trial counsel. He testified as to the psychological tests he administered to [B], her average intelligence, low self-esteem, and learning problems. After LCDR Huertas discussed post-traumatic stress disorder generally, trial counsel asked him for his clinical diagnosis of [B]. LCDR Huertas answered that there were two, a primary diagnosis of post-traumatic stress disorder, and a secondary diagnosis of "child abuse." Record at 155. He then described the symptoms [B] displayed for the diagnosis of post-traumatic stress disorder. The following colloquy then took place:

TC: Doctor, as a child psychologist, do you have an opinion as to the typical five or 6-year old's **ability to fabricate symptoms and behaviors** consistently enough over a period of time to be falsely diagnosed with post-traumatic stress disorder?

DC: Objection, Your Honor, he's asking for him to be a human lie detector.

MJ: Sustained. [*4]

TC: May I be heard on that, Your Honor?

MJ: No, let's press on.

TC: I'll ask it this way, Doctor.

Q: Do you have an opinion as to whether [B] is **capable of consistently fabricating her symptoms**?

A: Uh-huh--one of the reasons I gave her the WISK [sic] III intelligence test is to determine her level--her intellectual level. **In my opinion, she's not**

sophisticated enough to be able to fabricate this kind of story.

Q: What is your confidence level in your diagnosis, Doctor?

A: Uh-huh--it's pretty high--90 to 95%.

Record at 156-57 (emphasis added).

Later, during redirect examination, the trial counsel delved into the various causes of post-traumatic stress disorder. LCDR Huertas indicated they could include car accidents, airplane disasters, natural disasters, war, or witnessing the injury or killing of a loved one. The following then occurred:

Q: And, prior to reaching your diagnosis, did you rule out this whole range of possibilities for this child?

A: Yes, I carefully questioned mother and daughter about any other possibilities that may be--that may have occurred during that period of time and there were [*5] some but none that seemed so striking as a child sexual abuse.

Q: Now, defense counsel asked you about children who were easily traumatized. Even if a child is easily traumatized, doesn't it still require trauma?

A: Yes.

Q: Now, in response to the questions about therapy, you indicated that [B]--that the therapy is to teach the child how to cope.

A: Yes, in part.

Q: And, for [B] what is she coping with?

A: How to deal with what happened to her.

Q: Which was?

A: Uh-huh--my best guess is child sexual abuse.

TC: Thank you, Doctor.

Record at 159.

At an earlier time in the court-martial, the prosecution introduced, without objection, Prosecution Exhibit 6, the written psychological report of LCDR Huertas concerning [B]. This report began with a statement on the background for the report and the opinion of LCDR Huertas that both [B] and her mother were "reliable historians." It contained various statements that [B] had made to her mother describing how the appellant had "sexually abused" her, that her mother believed [B]'s statements, and that [B]'s memory, even for remote events, was good. It concluded that [B] suffered **[*6]** from post-traumatic stress disorder and "child sexual abuse." During the defense case, the appellant testified and denied the allegations against him.

The military judge twice instructed the members that they were to disregard the opinion of LCDR Huertas as to [B]'s credibility and that they had the sole responsibility of determining credibility of the witnesses, including [B]. Record at 161, 220. The first occasion was at the conclusion of LCDR Huertas' testimony, and the second on final instructions prior to deliberations.

Discussion

The Court of Appeals for the Armed Forces and this court have consistently held that child-abuse experts are not permitted to testify or opine that alleged child-abuse victims are telling the truth regarding an instance of alleged child sexual abuse. *United States v. Robbins,* 52 M.J. 455 (2000); *United States v. Birdsall,* 47 M.J. 404, 410 (1998); *United States v. Harrison,* 31 M.J. 330, 332 (C.M.A. 1990); *United States v. Petersen,* 24 M.J. 283, 285 (C.M.A. 1987); *United States v. Knox,* 46 M.J. 688, 691 (N.M.Ct.Crim.App. 1997). Such experts may not act as **[*7]** "human lie detectors" because such opinions exceed the scope of the expert's qualifications, violate the limits on character evidence, and usurp the exclusive function of the fact-finder to weigh evidence and determine the credibility of witnesses. *Robbins,* slip op. at 3; *Birdsall,* 47 M.J. at 410. They may testify, however, as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms. *Harrison,* 31 M.J. at 332. But they may not go so far as to place their "stamp of truthfulness" on a witness' story. *Id.* In *Birdsall,* the expert testified that the accused's sons were "victims of child sexual abuse." *Birdsall,* 47 M.J. at 408. The Court found prejudicial plain error, and quoted language from *United States v. Whitted,* 11 F.3d 782, 785 (8th Cir. 1993), that "[b]ecause jurors are equally capable of considering evidence and passing on the ultimate issue of sexual abuse, however, a doctor's opinion that sexual abuse has in fact occurred is ordinarily neither useful to the jury nor admissible." *Birdsall,* 47 M.J. at 409. **[*8]**

We find that the substance of the testimony and written report of LCDR Huertas necessarily left the members with the clear impression that an expert in child psychology who had interviewed [B] believed her "story." First of all, he testified that she was not sophisticated enough to have fabricated "this kind of story," and he was 90-95% sure of his diagnosis. Even though this was not what he was asked, the statement was made before the

members without objection. Second, he also testified that her post-traumatic stress disorder was caused by child abuse. Third, his opinions in Prosecution Exhibit 6, also entered into evidence without objection, added written emphasis to his testimony. He wrote that [B] was a "reliable historian," and that he had diagnosed her with post-traumatic stress disorder and child sexual abuse, thereby leaving the members with his opinion that [B] was sexually abused. This went well beyond simply stating her symptoms and that they were consistent with those found in children who have been sexually abused. He wrote that she had been sexually abused. These factors are virtually identical to those in *Harrison,*[2] and the admission of his ultimate conclusion **[*9]** of child sexual abuse was contrary to our superior Court's holding in *Birdsall.*

In this case, the defense counsel initially objected to a question posed by the trial counsel, and his objection was sustained. Trial counsel then rephrased the question as to [B]'s symptoms, and LCDR Huertas made his devastating response without objection. Prosecution Exhibit 6 was also entered into evidence without objection. We must therefore review this question under a plain error **[*10]** standard. MIL. R. EVID. 103(d). Under this standard, the appellant must show that there was error, that it was plain (clear or obvious), and that it materially prejudiced the appellant's substantial rights. *United States v. Olano,* 507 U.S. 725 (1993); *United States v. Powell,* 49 M.J. 460, 463-65 (1998); Art. 59(a), UCMJ.

For the reasons stated above, we find that error occurred

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[2] The record in *Harrison* contained expert testimony that the alleged victim did not make up or fantasize the incident, that she was reliable, and that she had suffered sexual abuse. The Court found in that case that the testimony was crucial to the prosecution's case, there was no corroborating physical evidence, no witnesses to corroborate her story and the accused denied the allegations. The Court held that the admission of the testimony was prejudicial error that was not cured by an instruction. *Harrison,* 31 M.J. at 332-33.

and that it was plain. While LCDR Huertas did not expressly state to the members that they should believe [B], his expressions of her reliability, her lack of the sophistication needed to fabricate her story, his diagnosis of child sexual abuse, and his 90-95 percent certainty in his diagnosis left the members, who were not experts in child psychology, with exactly the same message. The evidence he provided impermissibly crossed the line between explaining symptoms and the bases for his diagnosis, into commenting on [B]'s credibility and acting as a "human lie detector."

In determining whether or not this error materially prejudiced the appellant's substantial rights, we note that this was a hotly contested trial. The credibility of [B] was crucial. There were neither **[*11]** witnesses nor physical evidence to corroborate her story. The appellant, who presented testimony from four witnesses as to his good military character, denied the allegations. As a result, we find prejudicial plain error in this close case. *Harrison,* 31 M.J. at 332-33; *cf. United States v. Marrie,* 43 M.J. 35 (1995)(affirming guilty findings where the Court was able to determine that the error in the admission of such testimony was harmless beyond a reasonable doubt).

We are convinced that the instructions of the military judge did not cure this error. *Harrison,* 31 M.J. at 332-33; *Petersen,* 24 M.J. at 285; *Knox,* 46 M.J. at 691. Moreover, the military judge never addressed the issue of the expert's diagnosis of child sexual abuse, and the limiting instructions did not mention Prosecution Exhibit 6. We have also considered the holdings in *United States v. Eggen,* 51 M.J. 159 (1999) and *United States v. Arruza,* 26 M.J. 234 (C.M.A. 1988), but find them distinguishable on the basis that they involved the doctrine of "invited" error by the trial defense counsel. Such **[*12]** error does not exist in this case.

Conclusion and Decision

We conclude that prejudicial plain error occurred in the admission of evidence from the prosecution's child-abuse expert as to the believability of [B]'s story. Under these circumstances, the appellant was deprived of his right to a trial free from undue influence upon the fact-finders in their determination of the ultimate facts in this case.

Accordingly, the findings of guilty and the sentence are set aside. A rehearing as to Charge I and its Specification may be ordered.

Senior Judge TROIDL and Judge ANDERSON concur.

For the Court

CHRISTINE E. SHEEHY
Clerk of Court (Acting)

Government's Motion to Dismiss Appellant's Petition for Grant of Review

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Michael A. MENDOZA 462 04 9256 Hospital Corpsman Second Class(E-5) U.S. Navy, Appellant	GOVERNMENT MOTION TO DISMISS APPELLANT'S PETITION FOR GRANT OF REVIEW Crim.App. Dkt No. 98-1627 USCA Dkt No. 00-____/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

COMES NOW the United States, in accordance with the RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, RULES 19 AND 30 and moves to dismiss appellant's petition for grant of review dated July 5, 2000. The U.S. Navy-Marine Corps Court of Criminal Appeals set aside appellant's guilty findings and sentence on May 8, 2000. *See* Appendix. Accordingly, appellant has no conviction and therefore no standing to challenge the lower court's decision.

Appendix

A copy of *United States v. Mendoza*, No. 98-1627 (N.M.Ct.Crim.App. May 8, 2000) is hereto attached.

Conclusion

WHEREFORE, the Government respectfully requests that this Court grant this motion and dismiss appellant's petition for grant of review.

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Certificate of Filing and Service

I certify that the original and seven copies of the foregoing was delivered to the Court and a copy was delivered to appellate defense counsel on this 6th day of July 2000.

JANICE K. O'GRADY
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Appellant's Answer to Government's Motion to Dismiss Appellant's Petition for Grant of Review

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee	)	APPELLANT'S ANSWER TO
	)	GOVERNMENT'S MOTION TO
v.	)	DISMISS APPELLANT'S
	)	PETITION FOR GRANT OF
MENDOZA, Michael A.	)	REVIEW
Hospital Corpsman Second	)	
Class (E-5)	)	USCA No. 00-0565/NA
U.S. Navy,	)	Crim. App. No. 98-01627
462-04-9256,	)	
Appellant	)	

TO THE HONORABLE JUDGES OF THE UNITED STATESCOURT OF APPEALS FOR THE ARMED FORCES

COMES NOW the Appellant, pursuant to Rule 30(b) of this Court's Rules of Practice and Procedure, in answer to the Government's motion to dismiss. The Government's motion cites no authority for the proposition that the Appellant lacks "standing" to petition this Court because the findings and sentence were set aside by the lower court. To the contrary, Congress has required this Court "shall review the record in ... all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review." Article 67(a)(3). Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3).

Appellant's case was reviewed by the Navy-Marine Corps Court of Criminal Appeals. *United States v. Mendoza,* 2000 CCA LEXIS 133, No. 98-01627 (N.M.Ct.Crim.App. May 8, 2000)

(unpublished).[1] Appellant's Supplement to Petition for Grant of Review[2] sets forth the good cause why this Court should grant review, i.e. the lower court abused its discretion by setting aside the findings and sentence for legal error, and authorizing a retrial, without first considering whether the evidence was factually sufficient. Article 66(c), UCMJ, 10 U.S.C. § 866(c). This abuse of discretion materially prejudiced the substantial rights of Petty Oficer Mendoza to not be twice put in jeopardy of life or limb if the evidence at the first trial was factually insufficient. U.S. CONST. amend. v; Article 66(d), UCMJ, 10 U.S.C. § 866(d).

WHEREFORE the Appellant prays this Honorable Court will deny the Government's motion and grant his petition for review.

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[1] A copy of the lower court's opinion is attached to Appellant's Supplement to Petition for Grant of Review.

[2] Filed on July 7, 2000.

Certificate of Filing and Service

I certify that the original and seven copies of the foregoing were delivered to the Court on July 7, 2000, and that a copy of the foregoing was delivered to the Appellate Government Division, counsel for the Appellee, on July 7, 2000.

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***United States v. Mendoza*, __ M.J. __, No. 00-0565 (C.A.A.F., Aug. 21, 2000) (order dismissing petition for grant of review)**

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES
DAILY JOURNAL
No. 00-214
Monday, Aug. 21, 2000
PETITIONS FOR GRANT OF REVIEW - OTHER SUMMARY DISPOSITIONS

No. 00-0565/NA. U.S. v. Michael A. MENDOZA. CCA 98-1627. On consideration of appellee's motion to dismiss appellant's petition for grant of review and motion to make additional argument in support thereof and appellant's motion for stay of proceedings, it is ordered that appellee's motion to dismiss is granted without prejudice to appellant's right to file a petition for grant of review on a subsequent date; and that appellee's motion to make additional argument in support thereof and appellant's motion for stay of proceedings are denied as moot.

Record of Proceedings in the Rehearing of United States v. HM2 Michael A. Mendoza, USN

(unauthenticated)

(Argument, Essential Findings and Rulings on Motions to Dismiss)

* * *

The court-martial was called to order at 0900 hours, 19 October 2000.

MJ: This court will come to order. Let the record reflect that all parties who were present prior to our last session of the court are again present with the addition of a couple of counsel for the accused.

* * *

MJ: At our last session of court the accused was arraigned and asked about motions. I believe motions were reserved for today as well as pleas and forum selection.

MJ: At this point, I believe it is time to pick up with our considerable amount of motions. At an 802 session prior to court, counsel and I just went over the order in which the several motions will be proceeded and how we will proceed on those. And, a couple of other motions and replies to motions were also appended to the motions that were provided to me.

* * *

MJ: I think the next one we will take up is, uh, and really we should probably

take them both in tandem and we will, well, we will take them in tandem and that would be the motion to dismiss for double jeopardy and motion to dismiss by entering a finding of not guilty, the pretrial finding of not guilty. I will call the motion to dismiss for double jeopardy Appellate Exhibit VI and the motion for a finding of not guilty, Appellate Exhibit VII. And, I believe---Can you belay that on Appellate Exhibit VII? Let's give the Government's response to the motion to dismiss for double jeopardy Appellate Exhibit VII. We will call the finding of not guilty Appellate Exhibit VIII and the Government's response Appellate Exhibit IX.

MJ: Both motions rely on, uh, in terms of the facts, defense requested that the original record of trial be considered in this, I believe. Well, belay that. For the motion for double jeopardy, does the defense wishes to present the opinion of the Navy Court Marine Court of Criminal Appeals. I don't have a copy of that with me. And, I will attach that as part of Appellate Exhibit VI.

IMC: Your Honor, we would also request that you, as part of this motion, consider the appellate briefs as they were filed in this case because they relate to the actions of the Court of Criminal Appeals. At this time, I have copies of the brief, the answer.

MJ: Okay. Again, those will be part of Appellate Exhibit VI.

IMC: Thank you, sir.

MJ: Now, with that evidence does

either side have any other evidence to present on this particular motion?

TC: The Government has no evidence on either, Your Honor.

MJ: Does either side have anything to add to their motions or wish to make any argument on this?

IMC: Uh, the defense would like to make a brief argument just to kind of explain it on the record.

MJ: Sure. Okay.

IMC: The two motions as Your Honor noted, are offered in tandem. Uh, the motion to dismiss by entering a pretrial motion of not guilty, uh, the theoretical construct for this--and we acknowledge that both of these present issues of first impression not only for trial court but I think for the--in the Navy and Marine Corps at least as it relates to the factual sufficiency.

IMC: Um, the motion to dismiss by entering a pretrial motion of not guilty, we conceive that if this court can conclude, based upon it's review of the record of trial, the appellate briefs and the opinion of the Navy and Marine Corps Court of Criminal Appeals, that the court of Criminal Appeals opinion is tantamount to a finding of factual insufficiency. That the evidence at the first trial was insufficient to support the findings of guilty then this court can dismiss the charges or ultimately enter a finding of not guilty based on the first trial. Basically, recognizing that although they did not say on the basis of

the opinion the Navy-Marine Corps Court conclusions about the state of the evidence and their finding as it relates to the harmlessness of the error--or life harmlessness of the error in this case, is sufficient to conclude that the evidence before them was factually insufficient.

Alternatively, we have a motion for double jeopardy and the theoretical construct for that is this, that we acknowledge under Article 66(c) that the Court of Criminal Appeals has an obligation to review the record of trial from the first trial for factual sufficiency and if the evidence is factually insufficient--. By factually sufficient under United States v. Turner, it means that the Court of Criminal Appeals is not personally convinced that the evidence was proof of guilt beyond a reasonable doubt. So, we know that NMCCA under Article 66 has to review that.

If this court, based upon its review of the record of trial, the appellate briefs, and the opinion of the Court of Criminal Appeals, finds that factual sufficiency is fairly raised, in other words, it was a real question in the first trial and if this court finds that the Court of Criminal Appeals did not, whether substantial ambiguity as to whether or not it did conduct a factual sufficiency review, then under those circumstances appellate review of the first case was not properly terminated by the Court of Criminal Appeals. And, if that is the case, then the authorization for a rehearing in this particular case was ultra vires. The court cannot authorize a rehearing in the case until they have completed their factual sufficiency review. Under those

circumstances, this proceeding ought to be terminated because the first trial was never properly completed. The appellate review process in the first trial was not properly completed and the factual sufficiency review wasn't completed. And, that is what the citations in United States v. Turner talk about, clearly indicating there is an obligation, a substantial right on part of the accused, to have this factual sufficiency review. And, obviously, when you read the opinion of the Court of Criminal Appeals in this case they say they didn't consider it, they don't discuss it because they reversed it based upon legal error and yet when they discuss the facts of the particular case during their harmless analysis they indicated it is an extremely close case and the balance of the evidence is basically an equipoise which is evidence that there is not proof beyond a reasonable doubt.

Now, one of the things we also want to make clear in this particular case is that this decision, this issue, has not been resolved by C.A.A.F. and that is kind of--I don't want to say misrepresentation but, I think, mischaracterization of what actually happened on the petition for review to the Court of Criminal Appeals for the Armed Forces. I was the appellate counsel in the case. When this decision came down it became clear that the Government was going to go ahead with a rehearing so, that the issue of double jeopardy was a real issue at that point in time. Pursuant to Article 67 of the Uniform Code of Military Justice, we petitioned for review.

A fair reading of Article 67 indicates that the Court of Appeals for the Armed

Forces can review a decision of the Court of Criminal Appeals even if they so decide to set aside the findings of the sentence. There is nothing that says "absent of finding the sentence," they can't review it. The Government, the Appellate Government division at that point, filed a motion to dismiss. Argument--there was no findings and there was no sentence left after the action of the Court of Criminal Appeals. There was nothing left for C.A.A.F. to review. There was some additional replies and additional responses to that. But, the important thing is that the Court of Appeals for the Armed Forces came back and granted the motion to dismiss. Basically, not saying--not denying the petition for review and grounds for review. Certainly not considering those petitions but saying that they did not have jurisdiction to consider it and presumably, because there was no case left for them to review. Thus, they hadn't decided the issue and the only avenue that Petty Officer Mendoza has to raise this issue is to raise it now at the second trial.

And, so that's why we are at the procedural posture that we are. But, it is not appropriate to say that C.A.A.F. has considered this argument or rejected it. They haven't. They, basically, dismissed the petition without considering on its merits. They neither agreed to review it or deny it.

The Government also suggested this court, basically, is not in a position to, uh, if you will, review the Court of Criminal Appeals and that could certainly be true with regard to the first trial. But, we are in a second trial right now. We are

in a rehearing and while this court cannot reverse the Court of Criminal Appeals as to the first trial, it can consider the implications of the Court of Criminal Appeals' actions of whether or not those actions conform with the Uniform Code of Military Justice. And, if they find that they did not and they violated the rights of Petty Officer Mendoza under the double jeopardy clause and under Article 66(d), which is the fair statement of the double jeopardy clause under the unique fact finding powers of the Court of Criminal Appeals, then this court can take action to protect those interests which are discussed in the Supreme Court case of United States v. Burg and some of the other cases are cited in the motions that we have made.

So, that's kind of the dichotomy between the two different motions but, they ultimately come back to whether or not either, a) this court can conclude that the Court of Criminal Appeals, even though they did not say it on it's face, thought the evidence was factually sufficient, or this court can conclude that they didn't do the factual sufficiency and therefore, this case is not properly before a rehearing because the order for a rehearing was as a result of theirs.

MJ: Trial Counsel?

TC: Yes, sir. This is a case, as Lieutenant Commander Wentworth said, a first impression. The question would be, what kind of standard do we apply to review the actions of the superior court and Office of the Judge Advocate General. Perhaps the proper standard to apply is the presumption of regularity. And, that, uh, the courts--

the superior courts and the Office of the Judge Advocate know what they are doing and act in accordance with the law. And, um, that presumption applied here should be, as applied to the facts of the case, is that numerous--more than one court of appeal has had a chance to at least look at the briefs, regardless of the final reason for dismissing it. They have had a chance to look at this and the conclusion that the courts have come to is--one was the Office of the Judge Advocate General, is that the case belongs back down here for trial. And, so that is what we should move forward and do.

This issue is more properly before appellate court if defense wants to file some sort of extraordinary writ. That would be fine. But, to have this court enter a pretrial finding of not guilty, ends the Government's case forever and that's an awfully drastic remedy. Same for a finding of double jeopardy. Although that would, in my opinion, be reviewable by an appellate court and a finding of not guilty ends the case forever because then we are--the Government is foreclosed. There is no double jeopardy either. Convictions get overturned all the time and returned for new trials, exactly what has happened here. So, this court, at least, should not take any action to either make a finding of not guilty or dismiss for double jeopardy. That is something that the appellate courts looked at and presumably they have looked at it. Presumably the Navy-Marine Corps court did fulfill its obligations under Article 66 and just, through oversight, did not state--put one sentence in there, you know, "the evidence was otherwise sufficient to support a finding of guilty but because of the bad

expert testimony," that sentence is absent but that's--one sentence cures everything and that could have been an administrative oversight. This court should give deference to that court and presume that that court fulfills its obligations under the law.

The fact that it didn't mention--puts a sentence in there indicating that they have done so, should not be enough to end this case right here. The case should go forward to trial. And, the appropriate remedy, should defense seek it, would appropriately be to seek a writ with the Navy-Marine Corps court but, this court should not dismiss either for double jeopardy or enter a finding of not guilty.

* * *

The court-martial recessed at 1105 hours, 19 October 2000.

The court-martial was called to order at 1330 hours, 19 October 2000.

MJ: This court will come to order. Let the record reflect all parties that were present prior to the recess are once again present.

MJ: Alright, I am going to make rulings on most of these motions at this point. And, I will just go through it in the order in which you addressed. As I said with Appellate Exhibit IV, the motion for appropriate relief regarding references to the first trial, are agreed on so there is really no ruling to make other than as we discussed before, besides instruct your witnesses not to include the prior trial. And, if it does come up, we should try and

refer to it as another hearing.

MJ: Again, the shower incident, Appellate Exhibit V, both parties are in agreement and there will be no reference to that.

MJ: Regarding the motion to dismiss for double jeopardy, that motion is denied. There really is no essential findings of fact in this particular case. It's all a matter of law and it's just--basically, is my belief reading the law. I am not here to act as an appellate court. This was sent back for a rehearing and that is, basically, my marching orders. I don't have the authority to act as an appellate judge regarding the prior trial. So, that motion is denied.

MJ: Regarding the motion for a finding of not guilty, a pretrial finding of not guilty, uh, once again, I am not an appellate court. I am not here to review the record of trial. I am here to conduct a rehearing which is the appellate court has ordered me to do in effect. The only time I can make a finding of not guilty is once I have heard evidence on the merits per R.C.M. 917(a). Up until this point, that has not occurred so, in effect, I am denying this motion. I may revisit it at the close of the Government's case.

***United States v. Mendoza*, No. 20001767 (N.M.Ct.Crim.App. Nov. 6, 2000) (unpublished order denying petition for extraordinary relief)**

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

MENDOZA, Michael A. 462-04-9256, Hospital Corpsman Second Class (E-5) U.S Navy Petitioner,	) PETITION FOR) EXTRAORDINARY RELIEF) IN THE NATURE OF A) WRIT OF MANDAMUS AND) PROHIBITION AND A STAY) OF THE PROCEEDINGS BELOW
v.	)
BOYINGTON, Jr., J. E. Rear Admiral U.S. Navy, Chief of Naval Air Training Convening Authority,	) NMCM No. 200001767) ORDER
and	)
STRAUB, P. J. Commander Judge Advocate General's Corps, U.S. Navy, Military Judge, Respondents.	)

On consideration of the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and Prohibition and a Stay of the Proceedings Below, it is, by the Court, this 6th day of Nov. 2000,

ORDERED:

That the petition is denied without prejudice to the petitioner's right to raise the arguments contained in the petition for extraordinary relief during the normal course of appellate review, if the petitioner is convicted.

For the Court

R.H. TROIDL
Clerk of Court
6 Nov. 2000 (seal)

Copy to:
NMCCA (71), 45, 46, 02

***United States v. Mendoza*, __ M.J. __, No. 01-8006/NA (C.A.A.F. Dec. 15, 2000) (order denying writ-appeal)**

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES, Appellee	)	USCA Misc. Dkt. No. 01-8006/NA Crim. App. Dkt. No. 2000-1767
v.	)	ORDER
Michael A. MENDOZA (62-04-9256)	)	

On consideration of the writ-appeal petition, it is, by the Court, this 15th day of December, 2000,

ORDERED:

That said writ-appeal petition is hereby denied.

For the Court,

/s/ Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Navy
Counsel for Appellant (CLUVERIUS)
Counsel for Appellee